BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VERNON DICKERSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,014,645
A-1 APPLIANCE PLUMBING, HEATING & COOLING, INC.	)	
Respondent	)	
AND	)	
	)	
HAWKEYE-SECURITY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the March 4, 2004 preliminary hearing Order of Administrative Law Judge Bryce D. Benedict. Claimant was awarded benefits in the form of medical treatment and temporary total disability compensation after the Administrative Law Judge determined that claimant's accidental injury arose out of and in the course of his employment, finding "the claimant was specifically instructed by his supervisor to perform in the wrestling event which led to his injury."[1]

ISSUES

Did claimant suffer accidental injury arising out of and in the course of his employment on the date alleged?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be reversed.

On November 29, 2003, the date of accident, claimant worked his normal shift, from 9:00 a.m. to 2:30 p.m. He then left work, although it is noted that claimant was on

[1] March 4, 2004 preliminary hearing Order.

a 24-hour-a-day call for the entire week. However, on this particular date, he was not called back to work, but, instead, returned at approximately 6:00 p.m. to attend the company Christmas party in the company's conference room. While at the Christmas party, claimant climbed into one of the rented sumo wrestler costumes that respondent provided and, while wrestling with a co-employee, suffered injury to his right knee. The Administrative Law Judge determined that claimant was mandated by his supervisor to participate in the wrestling event and, therefore, benefits were appropriate.

Claimant testified that he went to the Christmas party for three reasons. First, it was a company-only social event and it provided him the opportunity to interact with co-employees. Second, awards were handed out at the Christmas party. Third, prizes were awarded at the Christmas party, including potential days off with pay.

While at the party, claimant was approached by his supervisor, Jason Holthaus (respondent's operations manager), and asked to participate in the sumo wrestling competition. Mr. Holthaus, who testified at the preliminary hearing, stated that no one was required to participate and, in fact, the attendance at the party was not even mandatory. He stated there were no repercussions against any employees who elected not to attend the party. Additionally, he testified that the names of twenty-five persons were called to wrestle, and twenty to twenty-two actually participated. The ones who did not choose to wrestle suffered no repercussions for their non-participation.

In proceedings under the Workers Compensation Act, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[2] K.S.A. 2003 Supp. 44-508(f) states, in part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury would not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

Claimant alleges that the fact that awards and prizes were given at the party, in effect, made the attendance compulsory. However, the testimony of Mr. Holthaus establishes that no one was required to attend the party and that there were no ramifications for failure to attend. *Larson's* lists three factors which must be considered when determining whether recreational and social activities fall within the course of an employee's employment.[3]

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[2] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[3] *2 Larson's Workers' Compensation Law*, § 22.01 (2000), at 22-2.

One factor is whether the employer expressly or impliedly requires participation in the activity or brings the activity within the orbit of employment by making the activity part of the service of employment. In *McIntosh v. City of Wichita,*[4] claimant, a firefighter with the City of Wichita, was injured while playing tennis with other members of the fire department. The Wichita Fire Department designated a specific daily fitness exercise period from 8:00 a.m. to 9:00 a.m. However, the injury to claimant occurred after 6:00 p.m., during what was identified as discretionary time. Additionally, the tennis courts were not located at the fire department, but required that the employees leave the fire station. The tennis activity was identified as a purely voluntary activity. The Board ruled that the claimant's injuries, suffered while playing tennis during discretionary time away from the department's premises, did not constitute an accidental injury arising out of and in the course of employment.

A second factor listed in *Larson's*, to determine whether a recreational activity is within the course of employment, is whether the employer derives a benefit from the employee's participation beyond the benefits of the employee's health and morale. A case on point is the *City of Oklahoma City v. Alvarado*,[5] in which a firefighter was injured while playing volleyball during his work shift. The court, in that instance, found the activity to be a regular incident and condition of employment since volleyball was recognized by that fire department as an accepted physical activity which was participated in by many employees and by supervisors. In *Flower v. City of Junction City,*[6] a firefighter was involved in volleyball during a specifically scheduled physical fitness time. Additionally, of the ten firefighters on duty, five were playing volleyball during that fitness hour. The Junction City Fire Department, in *Flower*, mandated that employees engage in physical fitness activities. In *Flower*, it was determined that the respondent derived a benefit from the employees' participation due to the improvement of the employees' health and morale.

A final factor in determining whether the recreational activities are within the course of the employee's employment is whether it occurs on the employer's premises during lunch or a regularly scheduled recreational period. *Larson's* has held "recreational injuries during the noon hour on the premises have been held compensable in the majority of cases."[7]

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[4] *McIntosh v. City of Wichita*, No. 265,500, 2003 WL 21688487 (Kan. WCAB June 17, 2003), aff'd by the Court of Appeals, No. 90,921 (Kansas Court of Appeals unpublished opinion, Apr. 2, 2004) (copy attached pursuant to Sup. Ct. Rule 7.04).

[5] *City of Oklahoma City v. Alvarado*, 507 P.2d 535 (Okla. 1973).

[6] *Flower v. City of Junction City*, No. 189,684, 1998 WL 100183 (Kan. WCAB Feb. 19, 1998).

[7] *2 Larson's Workers' Compensation Law*, § 22.03 (2000) at 22-5.

In the current case, the Board finds that participation, while encouraged, was not required at the Christmas party. Mr. Holthaus testified that several employees elected not to attend the party and several employees, who attended the party, elected not to participate in the wrestling activities, even though asked. There were no repercussions. In *Anderson v. Customer Caterers, Inc.,*[8] the claimant was injured at a Christmas party being given by her employer. Attendance was voluntary and took place after working hours. The employer stated that one reason for the party was to promote better employer/employee relations and that the employer would benefit by having happier and more satisfied employees. Benefits were denied by the Alabama court. Similarly here, there would be some benefit expected with having happier and more satisfied employees. However, that does not bring the activity within the course of employment as required by K.S.A. 44-501.

The final factor, whether the activity occurred on the employer's premises during lunch or a regularly scheduled recreational period, is easily resolved, as, while it was on the employer's premises, the activity occurred well after normal business hours and it was not during a regularly scheduled recreational period.

The Board, therefore, finds that claimant did not suffer accidental injury arising out of and in the course of his employment and the Order by the Administrative Law Judge granting benefits is, therefore, reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Bryce D. Benedict dated March 4, 2004, should be, and is hereby, reversed, and claimant is denied benefits, having failed to prove that he suffered accidental injury arising out of and in the course of his employment.

IT IS SO ORDERED.

Dated this ____ day of June 2004.

BOARD MEMBER

c: Gary E. Laughlin, Attorney for Claimant
John M. Graham, Jr., Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[8] *Anderson v. Custom Caterers, Inc.*, 279 Ala. 360, 185 So.2d 383 (1966).